JUDICIAL DEFERENCE TO CONGRESS: WHEN WILL IT END?

District Court of Guam Conference
July 2, 2018

Chief Judge Gustavo Gelpi

Anita Arriola, Esq.

Leevin T. Camacho, Esq. , Moderator

Under the Territorial clause of the Constitution, the U.S. Congress has the "power to make all needful Rules and Regulations respecting the Territory or other Property of the United States."

U.S. Const. Art. IV § 3, cl. 2

Congress has **"plenary authority"** over the territories.

1. States retain sovereignty under the Constitution.
2. "Guam's sovereignty is entirely a creation of federal statute."
   - "The Government of Guam is in essence an instrumentality of the federal government."
3. Plenary control by Congress
   - E.g., Congress may annul any act of Guam's Legislature.
4. But see, CNMI
   - Covenant Limits Federal Government's powers.
   - CNMI Courts disapprove CNMI "conceptualized" as a U.S. Territory.

Puerto Rico v. Sanchez Valle (2016): The ultimate source of sovereignty

- **Background:**
  - Sanchez Valle charged federally and locally for illegally trafficking in weapons and ammunition
  - Double Jeopardy Clause prohibits prosecuting a person twice for the same offense
  - Two prosecutions are not the "same offense" if brought by different sovereigns
  - Test is where the "ultimate source" of power derives from

Puerto Rico v. Sanchez Valle (2016): The ultimate source of sovereignty

- States are separate sovereigns from Federal government
  - "States rely on authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment."
  - "Prior to forming the Union, the states possessed separate and independent sources of power and authority, which they continue to draw upon in enacting and enforcing criminal laws."
  - "State prosecutions therefore have their most ancient roots in an 'inherent sovereignty' unconnected to, and indeed pre-existing the U.S. Congress."

Puerto Rico v. Sanchez Valle (2016): The ultimate source of sovereignty

- Puerto Rico (and all Territories) are not separate sovereigns

  The Court took a "historical" approach to the question:

  "And if we go back *as far as our doctrine demands* – to the 'ultimate source' of Puerto Rico's prosecutorial power . . . We once again discover the U.S. Congress."

Only **"fundamental"** rights apply in unincorporated territories

Justice White

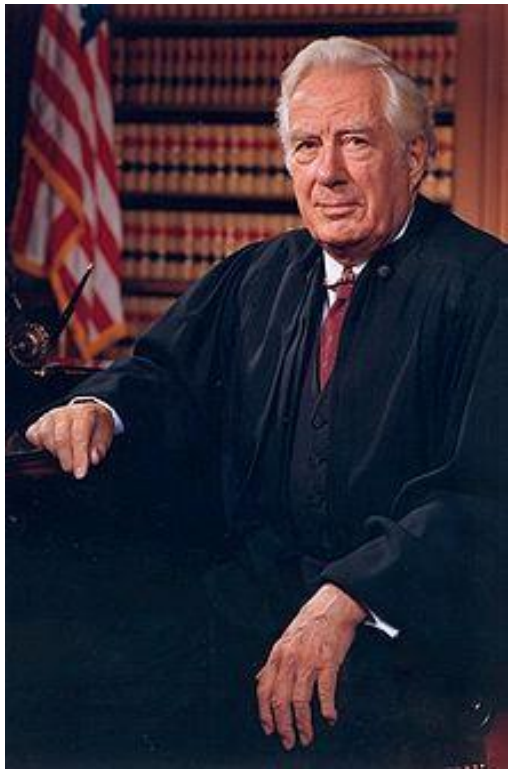
"[E]ven in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution."

Downes v. Bidwell, 182 U.S. 244, 291 (1901)

The question whether particular rights are fundamental has been answered only as specific cases come before the Supreme Court:

- The Fifth Amendment privilege against self-incrimination is a fundamental right. *Malloy v. Hogan*, 378 U.S. 1 (1964).
- The Sixth Amendment right to trial by jury and the Fifth Amendment right to indictment by a grand jury "are not fundamental in their nature, but concern merely a method of procedure . . . ." *Dorr*, 195 U.S. at 144-45.

The "Extension Doctrine" Who gets to decide What Rights Apply?



Chief Justice Burger

"Congress generally has left to this Court the question of what constitutional guarantees apply to Puerto Rico. However, because the limitation on the application of the Constitution in unincorporated territories is based in part on the need to preserve Congress' ability to govern such possessions, and may be overruled by Congress, **a legislative determination that a constitutional provision practically and beneficially may be implemented in a territory is entitled to great weight."**

Torres v. Commonwealth of Puerto Rico, 442 U.S. 465, 470 (1979)

Guam inhabitants successfully led a movement and petitioned Congress for U.S. citizenship. Congress enacted the Organic Act of 1950, 48 U.S.C. § 1421 *et seq.,* which, *inter alia*, created a civilian government in Guam and established a "Bill of Rights" modeled after the "Bill of Rights" in the federal Constitution 48 U.S.C. § 1421b.

§ 5 of Organic Act of Guam, Aug. 1, 1950

In *Haeuser v. Dep't of Law,* 97 F.3d 1152, 1156 (9th Cir.1996), the Ninth Circuit held that "The Organic Act serves the function of a constitution for Guam." But Guam has no locally adopted constitution, and its "Bill of Rights" was passed not by its citizens, but rather by Congress.

The language of the Speedy Trial Clause in the Organic Act tracks its federal counterpart almost exactly. *See* 48 U.S.C. § 1421b(g) ("In all criminal prosecutions the accused shall have the right to a speedy and public trial . . ."). We interpret the Speedy Trial Clause in the Organic Act as coterminous with its corresponding provision in the federal Constitution.

U.S. v. Drake, 543 F.3d 1080, 1085 (9th Cir. 2008), citing *Guam v. Guerrero,* 290 F.3d 1210, 1217-18 (9th Cir. 2002).

For the first twenty years after the Organic Act was passed, the U.S. president, not Guam voters, selected the governor. With the advent of the first appointed Chamorro governors,* there was a greater push for an elected governorship.

*Governor Joseph Flores (1960-1961) and Governor Manuel F.L. Guerrero (1962-1969)

From 1962 to 1965, Guam citizens and the Guam Legislature submitted many petitions lobbying the U.S. Congress for elective governorship. Most of these petitions died in congressional committees.

In 1965 members of the Guam Legislature and others lobbied Congress extensively to provide an elected governorship in Guam, a representative to Congress, and the right to vote for U.S. President.

In 1967 a bill was introduced in the House and Senate to provide for an elected governor in Guam and to extend certain constitutional provisions to Guam and the U.S.Virgin Islands.

As originally introduced, the bill to extend certain constitutional provisions to Guam provided:

> The provisions of clause 1 of section 2 of article IV and section 1 of amendment XIV of the Constitution of the United States shall have the same force and effect within the unincorporated territory of Guam as in the United States or in any State of the United States.

At the initiative of Rep. Patsy Mink (D-Haw.), the House Committee on Interior and Insular Affairs amended the provision to read:

> To the extent not inconsistent with the status of Guam as an unincorporated territory of the United States, the provisions of the Constitution of the United States of America and all its amendments shall have the same force and effect as in the United States.

Prompted by concerns that the inhabitants of territories were second-class citizens with few constitutional protections, the provision, which became known as the Mink Amendment, was amended to provide for a wider scope:

> The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that Territory and shall have the same force and effect there as in the United States or in any state of the United States; article I, section 9, clauses two and three; article IV, section 1 and section 2, clause 1; the first to ninth amendments, inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.
>
> All laws enacted by Congress with respect to Guam and all laws enacted by the territorial legislature of Guam which are inconsistent with the provisions of this subsection are repealed to the extent of such inconsistency.

"The Mink Amendment thus expressly extends to Guam the Due Process Clause of the Fourteenth Amendment, upon which the holding of *Roe* was founded. It may be true, as Guam argues, that the Supreme Court requires a clear indication of congressional intent before interpreting a congressional action as extending a right to the people of Guam. *See Guam v. Olsen,* 431 U.S. 195, 97 S.Ct. 1774, 52 L.Ed.2d 250 (1977). We can scarcely imagine, however, any clearer indication of intent than the language of the Mink Amendment: the relevant constitutional amendments "have the same force and effect" in Guam as in a state of the United States. There is no need, therefore, to go further. . . Accordingly, we hold that *Roe v. Wade* applies to Guam as it applies to the states."

Guam Society of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366, 1370 (9th Cir.), *cert. denied,* 506 U.S. 1011 (1992)

As it is an unincorporated U.S. territory, not all portions of the U.S. Constitution are necessarily applicable to Guam. *See Guam v. Guerrero*, 290 F.3d 1210, 1214, 1217 (9th Cir. 2002) ("Guam is a federal instrumentality, enjoying only those rights conferred to it by Congress"); *see also* 48 U.S.C. § 1421a ("Guam is declared to be an unincorporated territory of the United States").

Whether rights under the Constitution apply to a territory and, if so, to what extent, depends essentially on either of two factors, according to the *Insular Cases*.

- First, whether the right in question is considered to be "fundamental" or not. *Dorr v. United States*, 195 U.S. 138, 147 (1904) (fundamental rights are generally those "inherent, although unexpressed principles, which are the basis of all free government").

- Second, whether Congress has taken legislative action to extend U.S. constitutional provisions to Guam. *Guerrero*, 290 F.3d at 1214 ("[a]n act of Congress is required to extend constitutional rights to the inhabitants of unincorporated territories").

No Constitutional grant of U.S. Citizenship (2015)

We are unconvinced a right to be designated a citizen at birth under the *jus soli* tradition, rather than a non-citizen national, is a "*sin qua non* for 'free government" or otherwise fundamental under the Insular Cases' constricted understanding of the term . . . Citizenship by birth within the sovereign's domain may be a cornerstone of the Anglo-American common law tradition, but numerous free and democratic societies principally follow *jus sanguis* – "right of the blood" – where birthright citizenship is based on the nationality of a child's parents.

Tuaua v. United States (2015)

Congress can Treat Territories Differently if there is a **rational basis**

Territorial laws affecting "aliens" are subject to strict scrutiny	Federal laws affecting citizens living in territories* are reviewed for a rational basis
Exam. Bd. of Engineers v. Flores de Otero (1976)	*Califano v. Torres* (1978) *Rosario v. Harris* (1980) *Quinban v. Veterans Admin.* (D.C. Cir. 1991) *Besinga v. United States* (9th Cir. 1994)

"[T]he Territory Clause permits exclusions or limitations directed at a territory and coinciding with race or national origin, *so long as the restriction rests upon a rational basis.*"

Quiban v. Veterans Admin, 928 F.2d 1154, 1160-61 (D.C. Cir. 1991)

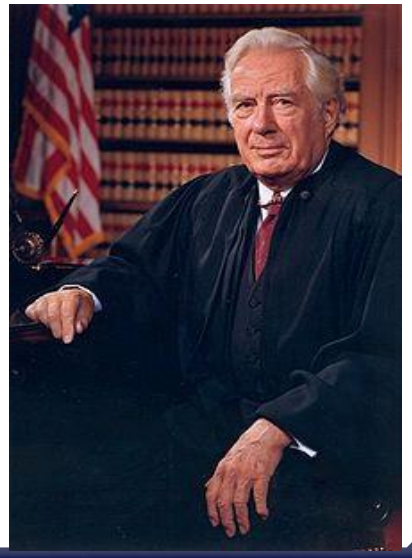
Rational Basis Applies

- *Harris v. Rosario,* 446 U.S. 651 (1980)(Per Curium):
  - Rational basis applied re: exclusion of federal financial benefits (AFDC) to Puerto Rico residents.
- *Califano v. Gautier Torres,* 435 U.S. 1 (1978) (Per Curium)
  - Excluding Puerto Rico Residents from SSI was Constitutional;
  - Congress can treat territory differently so long as there is a rational basis for doing so;
  - Finding that "the SSI benefits are significantly larger" under pre-existing programs available to Puerto Rico residents. *Id.* a n.2

Supreme Court Rationale

- ". . . Puerto Rican residents do not contribute to the federal treasury; the cost of treating Puerto Rico as a State under the statute would be high; and greater benefits could disrupt the Puerto Rican economy.
- ". . . we see no reason to depart from our conclusion in *Torres* that they suffice to form a rational basis for the challenged statutory classification."

Harris v. Rosario, 446 U.S. 651-652 (*per curium*).



Burger Court

Impact of Judicial Deference

Furthermore, Congress's discriminatory treatment of Puerto Rico in the allocation of subsidies as compared to its mainland counterparts is not only long-standing, but unfortunately also judicially sanctioned, relying on the Insular Cases.

Thus, Puerto Rico receives only a fraction of the federal support extended to its mainland counterparts. In fact, it receives little more than a tenth of the amount of Medicaid funding that is granted to wealthier states or those with smaller populations. The annual spending by the federal government under the Medicare and Medicaid programs per enrollee in Puerto Rico is the lowest in the nation. The inequality in this area is a major component in the creation of Puerto Rico's debt crisis, as the local government has been forced to cover health care funding shortfalls to provide even minimal health benefits to its population.

Hon. Juan R. Torruella, Why Puerto Rico Does Not Need Further Experimentation with its Future: A Reply to the Notion of "Territorial Federalism," Harvard Law Review (2018)

Judicial Deference to Congress: How will it end?

It is obvious that Congress will not correct the constitutional and moral injustices created by the democratic deficit that exits in the U.S.-Puerto Rico relationship, just as it failed to do so for African-Americans, thus requiring the Supreme Court to redress their festering grievances after almost a century of those grievances being tolerated. Clearly, it is up to the courts as guardians of the Constitution, and as the originators of this unequal treatment when they validated it in the *Insular Cases*, to correct this condition.

Hon. Juan R. Torruella, Why Puerto Rico Does Not Need Further Experimentation with its Future: A Reply to the Notion of "Territorial Federalism," Harvard Law Review (2018)

Carolene Products Approach

- Courts should defer to legislative bodies
- Those unhappy with the legislative action should seek redress through the political process and not the courts;
- If redress is unavailable through the political process, the Courts should be more solicitous.

U.S. v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938), quoting Laughlin, The Law of the United States Territories and Affiliated Jurisdications (1995) at 21

Are the Territories a "Suspect Class?"

A class that is

1) saddled with such disabilities, or

2) subjected to such a history of purposeful unequal treatment, or

3) relegated to such a position of political powerlessness . . .

as to command extraordinary protection from the majoritarian political process.

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

Si Yu’us Ma’ase